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tion for appeal was presented and allowed on April 16, 1943 (R. 36–37). The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C. 47, 47a); Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, par. (4) (28 U. S. C. 345); and Section 205 (h) of the Interstate Commerce Act, Part II, c. 498, 49 Stat. 543 (49 U. S. C. 305 (g)).

STATUTE INVOLVED

The relevant provisions of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 34–39.

QUESTIONS PRESENTED

The Commission, acting under the so-called "grandfather" clause of Section 206 of Part II of the Interstate Commerce Act, issued a certificate to appellant authorizing the continuance of its operations as a common carrier by motor vehicle of passengers and their baggage in a described area. The certificate was limited to "special operations, in non-scheduled door-to-door service, * * * of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats, during the season extending from June 1 to October 1, inclusive, over irregular routes" (R. 115–117). The questions presented by this appeal are:

1. Whether the Commission exceeded its authority in limiting the certificate as above specified.

2. Whether the Commission's order is supported by substantial evidence.

3. Whether appellant was accorded a fair hearing.

STATEMENT

This is a suit to set aside an order of the Interstate Commerce Commission, dated September 2, 1941, finding that appellant on June 1, 1935, and continuously since, has been in *bona fide* operation:

> as a common carrier by motor vehicle of passengers and their baggage, in special operations, in non-scheduled door-to-door service, limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats, during the season extending from June 1 to October 1, inclusive, over irregular routes, * * * as specified below:
>
> Between New York, N. Y., on the one hand, and, on the other, points and places in Sullivan County, N. Y., and the Townships of Hardenbergh, Denning, Rochester, Warwarsing, Gardiner and Shawangunk, Ulster County, N. Y., traversing New Jersey for operating convenience only.

(R. 116–117.)

and limiting its "grandfather" rights to such service. This order arose as follows:

On February 12, 1936, certain individuals, comprising a partnership known as Crescent Mountain Service,[1] filed a "grandfather" application, which was followed by a "statement of facts" filed March 26, 1937 (R. 43, 45), supplying certain information showing the type of service rendered and the routes of operation (R. 47–48), together with a map defining the routes and territory served, and other pertinent information (R. 49–54). At the same time, the applicant filed a statement (R. 46) wherein it "reserves the right to claim exemption from any and all provisions of the Motor Carrier Act, 1935, and the filing of this application shall not be deemed a waiver of any of the applicant's rights."

Following the practice adopted for expediting the numerous applications pending before the Commission, the application was referred to a field representative for a report on the nature and extent of the operations. On December 22, 1937, the applicant was directed to appear before local officials of the Commission at its New York office on January 11, 1938, to complete copies of a questionnaire which had been sent to the applicant and also to supply information called for by

[1] The partnership name was later changed to Crescent Cadillac Lines, and appellant corporation is its successor (R. 94, 112).

other forms (R. 55). The applicant failed to appear at the time and place suggested (R. 56), but on January 15, 1938, two of the partners appeared with the applicant's attorney and submitted "facts and evidence" (R. 62–83, 92, 94).

Protests against the granting of authority to the applicant were filed (R. 84–88), and on March 3, 1938, the Commission entered an order in this and other cases, in the nature of a rule to show cause, directing attention to the fact that an application for authority under the Act had been filed and that the applicants had failed to comply with various requests to furnish the facts necessary to a proper disposition of the applications. The applicants were required to state within 30 days why the application should not be dismissed. (R. 89–91.)

Appellant's predecessor, through one of the partners, filed an answer on March 19, 1938, in which it was stated (R. 94)—

> that the above applicant was duly notified to appear and submit facts and evidence on January 11, 1938. An adjournment was made to January 15, 1938. On January 15, 1938, Morris Glickman and I appeared with our attorney, Milton Cotton, Esq., at the New York District office of the Interstate Commerce Commission and submitted facts and evidence in support of our application.

On June 20, 1938, the Commission, Division 5, issued a compliance order,[2] the material portion of which reads as follows (R. 105):

> The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, over the regular route, between fixed termini, and to and from intermediate and off-route points, during the season extending from the 1st of June to the 1st of October, inclusive, is as specified below:
>
> Between New York, N. Y., and Woodbourne, N. Y.:

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[2] Such an order was described by this Court in *Ziffrin, Inc.* v. *United States*, 318 U. S. 73, 78, as an "ex parte permit."

As to the effect of a "compliance" order, the United States District Court for the Western District of Missouri said in *Hoerman* v. *United States*, decided June 5, 1941, not reported:

> The whole force of Point I, however, depends upon the assumption that the Commission had once granted a certificate to plaintiff. But it had never done that. The Commission only had granted a conditional permit (called a "compliance" order), reserving jurisdiction ultimately to grant or deny the application. (There was such a multitude of applications under the grandfather clauses that no course was practical other than to grant temporary permits and defer final action.) Nothing in the act forbids such a reservation of jurisdiction.

See also *Ideal Motors, Inc., Contract Carrier Application*, 24 M. C. C. 187; *Merchants Parcel Delivery Co., Inc., Contract Carrier Application*, 21 M. C. C. 93, 94; *Charles Burnett Trucking Co., Inc., Common Carrier Application*, 10 M. C. C. 615, 616.

> From New York over George Washington Bridge to Fort Lee, N. J., thence over New Jersey Highway 4 to Bergenfield, N. J., thence over New Jersey Highway 2 to the New Jersey-New York State line, thence over New York Highway 17 to Monticello, N. Y., and thence over New York Highway 42 to Woodbourne, and return over the same route.
>
> Intermediate and off-route points within 20 miles of Woodbourne.

This was a considerably broader certificate than the one now under attack (cf. p. 8, *infra*). Protests against the granted authority were filed by a number of competing motor carriers (R. 105–111), as a result of which letters of September 14, 1938, advised the protestants that their objections had been considered and "you are hereby advised that the facts set forth in support of such objections have been deemed sufficient to warrant referring this case back to the field for further investigation" (R. 109–111). The order of June 20, 1938, never became effective. Further informal hearing was held on December 1, 1938 (see R. 121, 31). Appellant's predecessor was given notice of this hearing[3] but did not at-

[3] The lower court found that notice was given to appellant (R. 29, 31) although appellant denies (Br. 6, 15) that notice was given. Actually, a notice of rehearing was sent by the Commission to appellant's predecessor, which was then operating the business (see R. 121, 31).

tend. No new evidence was offered at this hearing (R. 122, 31).

After reconsideration of the same record, the Commission issued the present certificate on September 2, 1941, granting appellant the right to operate between New York and points in Sullivan and Ulster Counties, New York. However, the Commission restricted in certain respects the type of service to be performed. Thus, the certificate limited appellant's service to "the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats". It also described the service to be rendered by appellant as "door-to-door service,"[4] as being "non-scheduled", and as constituting "special operations" over "irregular routes". (R. 115–117.)

While the Commission was considering the kind of certificate to which Crescent was entitled, there were fifty-eight other applications pending before it, involving this same territory, type of operation, and the Commission's authority to describe the type of service which such operators should be granted. These cases were consolidated and were known as *Irving Nudelman Common Carrier Application et al.*, Docket No. MC–86772.

[4] The district court construed the "door-to-door" limitation as not preventing appellant from picking up passengers at its fixed stations in the Bronx or elsewhere (R. 30, 35).

In addition, the application of *Sullivan County Highway Line, Inc.*, Docket No. MC–29649, covered similar facts and involved the same question. As was recognized by the district court, the pendency of these cases before the Commission on formal records accounts for the delay in finally passing upon appellant's application (R. 31–32, 36).

On February 15, 1940, the Commission, Division 5, issued its decision in the *Sullivan County* case, finding that it was unable to accept the view "that a substitution of busses for sedans will change the character of the service to such an extent as to constitute an operation essentially different from that conducted on the statutory date." 21 M. C. C. 717, 722. Chairman Eastman disagreed with this view (at p. 724). On March 20, 1940, the Commission, Division 5, reached a similar conclusion in the *Nudelman* case, 22 M. C. C. 275, with Chairman Eastman again dissenting (at p. 285). However, both the *Sullivan County* and the *Nudelman* cases were reconsidered by Division 5, and on February 25, 1941, the Division issued a report on reconsideration in the *Nudelman* case, 28 M. C. C. 91, finding that the applicants therein were engaged in (1) special seasonal operations as common carriers by motor vehicle of passengers and their baggage, between New York City, or portions thereof, on the one hand, and Sullivan and Ulster Counties, New York, or

portions thereof, on the other, (2) over irregular routes through New Jersey, and restricted the authority to special operations in (3) non-scheduled (4) door-to-door service, limited (5) to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under 10 years of age who do not occupy a seat or seats. The *Sullivan County* case was also reconsidered by the Commission, Division 5, and was decided on August 2, 1941, 30 M. C. C. 133, the Commission reaching the same conclusion as its report on reconsideration in the *Nudelman* case.

On September 2, 1941, the order here under attack was issued (R. 115–117), the Commission, Division 5, merely substituting a designation of appellant's type of service rendered on June 1, 1935, and containing the above five restrictions, in conformity with its latest determination in the *Nudelman* case, in lieu of its previous description of the type of authority as contained in the order of June 20, 1938 (R. 103–105).

On October 10, 1941, appellant, the corporation succeeding to the interests of the partnership (R. 112), filed a petition to stay issuance of the September 2, 1941, certificate, requesting Division 5 to vacate the order and reinstate the compliance order of June 20, 1938 (R. 117–120). No issue was made therein as to the facts, nor was any request for further hearing contained in the

petition which was denied on March 17, 1942 (R. 131–132). On April 6, 1942, appellant filed a petition "for reconsideration by the entire Commission and/or to reopen and grant a hearing" (R. 132–136). After replies thereto had been filed by protestants (R. 136, 148) this petition was denied by order of July 13, 1942 (R. 158), whereupon this suit was filed on September 30, 1942 (R. 2–3).

The statutory court sustained the Commission's order in every respect. An appeal was taken to this Court; appellees filed motions to affirm; and on June 7, 1943, the case was transferred to the summary docket.

SUMMARY OF ARGUMENT

I

In granting a certificate under the "grandfather" clause of Section 206 (a), the Commission is to assure a "substantial parity between future operations and prior *bona fide* operations." *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 481. Such "substantial parity" would not be attained if appellant were permitted to substitute for the seven-passenger sedans operated prior to the "grandfather" date, buses carrying "thirty or forty passengers."

The statute authorizes the Commission in issuing a certificate to "specify the service to be rendered" by the carrier. Section 208 (a). Under this authority, and consistently with the evidence before it, the Commission could properly

designate appellant as a common carrier of passengers by motor vehicle, limited to (a) special operations, in (b) non-scheduled, (c) door-to-door service, (d) over irregular routes, of (e) not more than six passengers in any one vehicle, not including the driver or children under 10 years of age who do not occupy seats. *Noble* v. *United States,* 319 U. S. 88; *Royal Cadillac Service, Inc.* v. *United States,* 317 U. S. 595.

The proviso to Section 208 (a) contains no bar to the Commission's action herein. To construe the proviso in accordance with appellant's contentions would defeat the purposes of the Motor Carrier Act.

II

Through forms filed with the Commission in support of the application, together with information furnished by appellant in affidavits and otherwise, the Commission was fully informed of the facts concerning the operations involved. As the district court found, the evidence clearly justified the Commission's order.

III

In considering applications under the "grandfather" clause, the statute permits the Commission to adopt a practical way of disposing of the many applications before it and does not require a formal hearing. Thousands of such applications have been referred to the Commission's field

offices for the development of facts to enable it to dispose of the many pending cases. Appellant, without protest, appeared in this manner and introduced all the evidence it wished in support of its application. It was satisfied with the first order entered by the Commission on June 20, 1938, and made no complaint of procedural error until after the Commission modified its earlier order on September 2, 1941, following its decision in the *Nudelman* case. The Commission was free to change its order on the same record, both under the statute (sec. 221 (b)) and under decisions of this Court (*e. g., Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 482).

ARGUMENT

I

THE COMMISSION PROPERLY LIMITED APPELLANT TO THE SAME KIND OF SERVICE THAT IT WAS CONDUCTING ON JUNE 1, 1935

Appellant filed an application under Section 206 (a) of Part II of the Interstate Commerce Act, which contains the "grandfather" clause, under which the Commission is authorized to issue a certificate without a showing of public convenience and necessity if the carrier or its predecessor in interest "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time." The purpose

of the "grandfather" clause (*United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 481) "was to assure those to whom Congress had extended its benefits a 'substantial parity between future operations and prior *bona fide* operations.'" If there is a difference between the operations before and after the critical date, the operations are not a continuation of those commenced prior thereto, and the Commission must deny the certificate. Cf. *Gregg Cartage Co.* v. *United States*, 316 U. S. 74, 78; *United States* v. *Maher*, 307 U. S. 148, 155; see also *Royal Cadillac Service, Inc.* v. *United States*, 317 U. S. 595.

After informal proceedings in the New York City field offices of the Commission, at which appellant introduced considerable evidence (R. 62–83, 92, 94), the Commission issued to it a "grandfather" certificate authorizing the continuance of operations as a common carrier by motor vehicle of passengers and their baggage in a described area, limited to "special operations, in nonscheduled door-to-door service, * * * of not more than six passengers in any one vehicle, but * * * not including children under ten years of age who do not occupy a seat or seats,[5] during the

[5] In complaining (Br. 21–22) of the restriction of the Commission by which appellant is permitted, in addition to the driver and six passengers in any one vehicle, to carry such children under ten years of age as do not occupy a seat or seats, appellant misconstrues the action of the Commission. No child is deprived of a seat if a ticket is purchased. The restriction was intended to permit parents to carry small

season extending from June 1 to October 1, inclusive, over irregular routes"[5] (R. 116–117). It is appellant's claim (Br. 19–29) that the proviso of Section 208 (a)[6] entitled it to an unrestricted certificate, without particular reference to the type of service it had rendered on and prior to the "grandfather" date. Appellant believes that under this proviso it could substitute large buses

children on their laps if they desire. Whether there are too many children traveling to permit such an arrangement goes to the question of public convenience and necessity under Section 207 of the Act, and not to the propriety of a "grandfather" certificate.

[6] Section 208 (a) of Part II of the Interstate Commerce Act provides (49 U. S. C. 308 (a)):

"Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

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carrying thirty or forty passengers (Br. 5, 9, 21, 22) for the seven-passenger sedans operated prior to the "grandfather" date (R. 34).

The authority of the Commission to include restrictions of the kind involved here under its power to "specify the service to be rendered" (sec. 208 (a)) has been the subject of much consideration. As referred to in the Statement (*supra,* pp. 8–10), the Commission, Division 5, in the *Sullivan County* and *Nudelman*[7] cases, Chairman Eastman dissenting, first concluded that it had no authority to impose these restrictions. On reconsideration of those cases, Division 5 reversed itself.

By virtue of the final determination in the *Nudelman* case, the Commission, by its order herein of September 2, 1941, merely authorized the issuance of an appropriate certificate properly describing, upon all of the evidence and facts before it, the service rendered by appellant. Appellant does not dispute or deny the facts and method of its operation. It contends (Br. 19–29) that the order of September 2, 1941, limits the holder of the certificate to the use of sedans in contravention of that portion of Section 208 (a) which permits a carrier to increase its service as the demands of the business may require.

[7] The petition for rehearing in the *Nudelman* case, 28 M. C. C. 91, which is the leading case on the subject, was denied by the entire Commission on June 9, 1941.

In the *Nudelman* report, the Commission has fully discussed its position in respect thereto.[8] Simply stated, it merely means that once a certificate is issued, whether it be pursuant to Section 206 (a) ["grandfather" rights] or 207 (a). [new operations], describing "the service to be rendered" (sec. 208 (a)), then there shall be no limitation as to the *quantity* of that type of service. Speaking for the court below, Judge Learned Hand said in this connection (R. 34):

> No one suggests that the proviso to Sec. 308 (a) [208 (a)] authorizes the carrier to change the prescribed route, and there is as little reason for saying that it justifies a change in the service to be rendered. Unless that feature of the certificate is to become a dead letter, and the Commission is to be stripped of all power except to fix routes, the carrier cannot have power substantially to modify the quality of his service, however free he may be to "add" to it in amount; and certainly nothing can more directly touch the quality of transportation than the cars in which passengers are carried. Indeed, limitation as to the quality of the service was inevitable in the public interest: a line of light small passenger cars—like those here at bar—may be desirable, however numerous, over routes upon which a fleet of powerful, heavy,

[8] A portion of the Commission's second report in the *Nudelman* case is set forth in the Appendix, *infra*, pp. 39–42.

commodious, motor busses, capable of seating forty or fifty passengers, and weighing perhaps ten tons, would be wholly unsuitable.

The recent decision of this Court in *Noble v. United States*, 319 U. S. 88, supports the Commission's decision in this case. There, in dealing with a contract carrier, the Commission had imposed certain restrictive provisions under the authority conferred upon it by Section 209 (b) to specify in the permit "the business of the contract carrier covered thereby and the scope thereof," whereas in this case the language of the statute, Section 208 (a), requires the Commission to specify in the certificate "the service to be rendered" by the carrier. In sustaining the Commission's order, the Court said (319 U. S. at 91-92):

> * * * An accurate description of the "business" of a particular contract carrier and the "scope" of the enterprise may require more than a statement of the territory served and the commodities hauled. An accurate definition frequently can be made only in terms of the type or class of shippers served. Unless the words of the Act are given that interpretation, permits under the "grandfather" clause may greatly distort the prior activities of the carrier. He who was in substance a highly specialized carrier for a select few would be treated as a carrier of general commodi-

ties for all comers, merely because he had carried a wide variety of articles. That would make a basic alteration in the characteristics of the enterprise of the contract carrier—a change as fundamental as we thought was effected by a disregard of the nature and scope of the holding out of the common carrier in *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475. If the business of the contract carrier were not defined in terms of the type or class of shippers served, that "substantial parity between future operations and prior *bona fide* operations" which is contemplated by the Act (*Alton R. Co.* v. *United States*, 315 U. S. 15, 22) would be frequently disregarded. The "grandfather" clause would be utilized not to preserve the position which the carrier had obtained in the nation's transportation system, but to enlarge and expand the business beyond the pattern which it had acquired prior to July 1, 1935. The result in the present case would be a conversion, for all practical purposes, of this contract carrier into a common carrier—a step which would tend to nullify a distinction which Congress has preserved throughout the Act. If such a metamorphosis is to be effected or if the appellant is to obtain a permit broader than the actual scope of his established business, the showing required by other provisions of the Act must be made. See § 206 (a), § 207, and § 209 (b).

The operations of appellant during the "grandfather" period are like those which this Court recently considered in *Royal Cadillac Service, Inc.* v. *United States*, 317 U. S. 595. The Court there affirmed, *per curiam*, an unreported decision of a three-judge court sustaining an order of the Commission denying a "grandfather" certificate to Royal Cadillac Service, Inc. That company, as the opinions of the district court and the Commission indicate,[9] had conducted operations in the Catskill area in seven-passenger sedans during the early part of the "grandfather" period. Those operations, like appellant's, were largely from door to door, with no fixed schedule, and following a fixed route for only that part of the journey between New York City and Wurtsboro, New York. Because Royal Cadillac subsequently during the "grandfather" period had changed its sedan operations to bus operations on a fixed schedule, between fixed termini, the Commission and the court held that there had been such a substantial change in the nature of the service as to break the continuity of the same type of service required for a "grandfather" certificate.[10] See *Gregg Cartage Co.* v. *United States*, 316 U. S. 74,

[9] The Commission's decision is reported in *Royal Cadillac Service, Inc., Common Carrier Application*, 30 M. C. C. 469.

[10] The "grandfather" clause requires that a carrier, in order to secure a certificate, must not only have been "in bona fide operation on June 1, 1935," but that it also shall have "so operated since that time" (sec. 206 (a)).

78; *United States* v. *Maher*, 307 U. S. 148, 155. As here, it was urged that the decision was erroneous on the ground that Royal Cadillac's right to add to its equipment, under the proviso of Section 208 (a), would be thereby restricted. However, this Court, in affirming, stated that such an argument raised no substantial question. *Royal Cadillac Service, Inc.* v. *United States*, 317 U. S. 595."

The difference between this case and the *Royal Cadillac* case is that here there apparently has been no change by appellant in the type of service rendered on and prior to the "grandfather" date. Accordingly, appellant is entitled to a certificate authorizing it to continue the same type of operations as it was performing on June 1, 1935. The power of the Commission to impose restrictions so confining appellant has been plainly granted by Section 208 (a). As was said in *United States* v. *Maher*, 307 U. S. 148, 155:

> The recognized practices of an industry give life to the dead words of a statute dealing with it. * * * Such recognition is implicit also in the provision of Section 208 (a) that "Any certificate issued

[11] The *per curiam* opinion stated that the only substantial question raised was whether, under Section 206 (a) of the Act, Royal Cadillac could continue operations until the determination by the Commission of its application for a certificate of public convenience and necessity. This question had become moot. No such question is involved in the present case.

> under section 206 or 207 *shall specify the service to be rendered* * * *". [Italics supplied.]

And in *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 483, this Court said:

> By Section 208 (a) the certificate must specify "the service to be rendered" by the carrier. * * *

The Court quoted with approval (at p. 485) the following excerpt from the Commission's opinion in *Powell Brothers Truck Lines*, 9 M. C. C. 785, 792:

> Common carriers which are expected to maintain regular service for the movement of freight in whatever quantities offered to and from all points on specified routes cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular-route service.

By its order here, the Commission has given appellant everything it possessed on the "grandfather" date and has effectuated a substantial parity between the authorized operations and the prior "grandfather" operation. *Alton R. Co.* v. *United States*, 315 U. S. 15. The "scope of the certificate" is for the "expert judgment of the Commission" and is the exercise of a function "reserved exclusively" for it. *United States* v.

Carolina Freight Carriers Corp., 315 U. S. 475, 489–490.

The prime purpose of the Motor Carrier Act of 1935,[12] expressed in its declaration of policy (Appendix, *infra*, p. 34), was to provide regulation and foster sound economic conditions in the motor-carrier industry in order to prevent chaotic conditions. See S. Rep. No. 482, 74th Cong., 1st sess., pp. 2, 3; S. Doc. No. 152, 73d Cong., 2d sess., p. 33. If appellant's interpretation (see pp. 15–16, *supra*) of the proviso to Section 208 (a) were accepted, carriers would be permitted to change their type of service as the demand arose without any proof of convenience and necessity respecting the changed type of service. Not only would the Commission be stripped of all power of regulating the service of common carriers by motor vehicle, except as to prescribing routes, by such an interpretation, but the competitive result would destroy all but the strongest carriers, particularly in metropolitan areas, where the sedan type of operations during the summer months is normally quite prevalent.

The facts in respect to appellant's method of operation on June 1, 1935, were developed in the evidence presented to the Commission, and they reveal that appellant was in fact engaged in a

[12] This Act (49 Stat. 543) was retitled Part II of the Interstate Commerce Act by the Transportation Act of 1940 (54 Stat. 919).

service which was properly described by the Commission as (1) "door to door"; as (2) non-scheduled; over (3) irregular routes;[13] in (4) special operations;[14] and (5) limited to the carry-

[13] The sharp distinction between irregular-route, territorial operations, and regular-route operations between fixed termini was recognized in *United States* v. *Maher*, 307 U. S. 148, 154–155.

[14] The Commission was required to impose the limitation as to "special" operations if any certificate at all was to be granted here, for Section 207 (a) contains a proviso "that no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

The difference between "special" and "charter" operations is described in *Fordham Bus Corp. Common Carrier Application*, 29 M. C. C. 293, 297, affirmed, 41 F. Supp. 712 (S. D. N. Y.), where the Commission said:

"There remains for consideration applicant's second contention that both special and charter operations should have been authorized. The terms 'charter' and 'special' operations as applied to motor carriers of passengers under part II of the act are frequently confused and sometimes erroneously used as virtually synonymous. It is clear, however, that, properly employed, each identifies a particular and distinct type of service. Charter service contemplates the transportation of groups, such as lodges, bands, athletic teams, schools, or other travel groups, assembled by someone other than the carrier, who collectively contract for the exclusive use of certain equipment for the duration of a particular trip or tour. Special service, on the other hand, contemplates that service rendered generally on week-ends, holidays, or other special occasions to a number of passengers which the carrier itself has assembled into a travel group through its own sales to each individual passenger of a ticket covering a particular trip or tour planned or arranged by the carrier.

ing of six passengers and the driver. Judge Hand's opinion adequately explains these limitations and the authority of the Commission to make them (R. 31–36).

II

THE COMMISSION'S ORDER IS SUPPORTED BY SUBSTANTIAL EVIDENCE

In the forms filed by appellant's predecessor in support of its "grandfather" application, it set forth in detail the type of operation which it conducted and for which it sought authority (R. 43–54), even claiming that because sedans, rather than buses, were employed in its business, its activities fell outside the purview of the Interstate Commerce Act (R. 46). In Exhibit A attached to its application, the applicant asserted that its route was from New York City, via the George Washington Bridge, to Suffern and Wurtsboro, New York, where traffic was distributed to the Catskill summer resorts within a radius of twenty miles from Woodbourne, New York (R. 47–48).

In *Red Star Sightseeing Line, Inc., Common Carrier Application*, 1 M. C. C. 521, and in *Blue and Grey Sight Seeing Tours, Inc., Com. Car. Applic.*, 8 M. C. C. 124, the distinction between charter and special operations is clearly recognized, and in each case authority is granted to conduct exclusively special operations in round-trip sightseeing or pleasure tours. The same distinction has been consistently observed in numerous subsequent cases * * *."

Annexed thereto was a map[15] showing the New York area and the manner in which appellant traveled to the territory served by it. The area serviced was indicated by a large irregular circle drawn on the map. (R. 49.) Attached to the exhibits was an advertisement card which read in part (R. 80):

> 7 Passenger Cars Leaving Daily to All Parts of the Mountains At Lowest Prices [a number of destinations were listed] From Your Home to Your Hotel. Boarding and Rooming Accommodations if desired. Please Call to See Us at Our Residence About Reservation.
>
> CRESCENT MOUNTAIN SERVICE,
> *531 East 169th Street.*

Prior to the issuance of the compliance order of June 20, 1938, the application was referred to the district office of the Commission for further investigation and informal hearing and conference with the applicant. (See R. 97.) At the informal hearing before a District Supervisor, additional proof of operation was submitted in the form of affidavits[16] and oral statements (R. 62–83, 92, 94). The partnership's books, in the form

[15] On January 25, 1938, the applicant filed a supplemental Exhibit A, which contained another map clearly showing on its face that the applicant was a radial, irregular route, territorial operator (R. 59).

[16] Excerpts from the affidavits, which illustrate the service rendered by appellant's predecessor in the "grandfather" period, appear in the Appendix, *infra*, pp. 42–44.

of "diaries" showing reservations for passengers, were also introduced, indicating the manner in which the business was conducted. (See R. 62.) At no time were any schedules of operations produced, nor any proof of operation of a regular-route terminal to terminal operation, nor any advertisements, "holding-outs," leases, or other evidence indicative of such an operation.

Upon this proof, the Commission issued the compliance order of June 20, 1938 (R. 103–105), to which exceptions were filed by protestant bus carriers (R. 105–111). Thereafter, the proceedings were referred back to the Commission's district office for further informal investigation (see R. 110), and appellant's predecessor was requested to attend an informal conference on December 1, 1938. (See R. 121, 31.) At this conference, no additional data was submitted beyond that originally given to the District Supervisor (R. 122, 31); that data consisted of evidence of seven-passenger sedan movements over irregular routes in a door-to-door service, between points in New York City and specific points in Sullivan and Ulster Counties, New York.

Appellant's claim (Br. 30–33) that its operations were regular-route operations[17] is so contrary to the undisputed facts that it is only necessary to refer the Court to the application (R. 43–52) and the supporting affidavits (R. 63–76),

[17] See fn. 13, p. 24, *supra*.

indicating the type of "grandfather" service rendered.

There was no contested hearing in this case, and the only evidence submitted was that of the applicant.[18] The affidavits stress the distinctive and special type of service rendered by Crescent Mountain Service during the "grandfather" period and reflect the furnishing of a type of travel distinct from that furnished by regular train or bus travel, a type which, as the affidavits disclose, had its special advantages in convenience and flexibility. And the affidavits definitely disclose also that appellant's predecessor operated a special, non-scheduled, door-to-door, radial, irregular-route operation, conducted with vehicles carrying not more than seven passengers including the driver (R. 63–76). See Appendix, *infra*, pp. 42–44.

Thus, Crescent's own uncontradicted proof is the substantial evidence supporting the Commission's order, and the district court properly held that the order was "adequately supported by evidence" (R. 29).

[18] Protestants offered no evidence because of their view that the applicant sought only the right to continue its special door-to-door, radial, irregular-route, territorial operations, conducted with vehicles carrying not more than seven passengers including the driver. As long as it was engaged in this type of business alone, the applicant obviously did not compete with the opposing bus carriers.

III

APPELLANT WAS ACCORDED A FAIR HEARING

In the administration of the Act, the Commission has disposed of many "grandfather" motor carrier applications through the medium of informal hearings in its district offices.[19] The Act permits the Commission to adopt a practical way of disposing of the many applications before it. Section 204 (a), (6) (49 U. S. C. 304 (a) (6)). It must be remembered that the only evidence presented to the Commission in this case was by appellant or its predecessor. No counter-testimony was introduced by protestants, who were not opposed to appellant's being given a certificate covering the type of service rendered on June 1, 1935. Since the certificate authorizes operations similar to those this evidence shows appel-

[19] As pointed out by this Court's decision in *Gregg Cartage Co.* v. *United States*, 316 U. S. 74, 84, "the Commission had nearly 90,000 applications to pass upon under Section 206 (a) * * *." It was essential for the Commission to adopt a procedure, including reference to its field forces for investigation of the facts, under which it could "act on the pending applications with the least possible delay." 51st Annual Report of the Interstate Commerce Commission, p. 71 (1937). "Grandfather" applications, the Commission stated, "are being handled by an informal conference method to a very large extent. Only those which are too complicated or controversial for such handling are set for hearing." A table in the report reveals that 24,541 applications had so far been referred to the field force. (*Ibid.*)

lant was conducting on the "grandfather" date, no just cause of complaint appears.

In addition, the record in this case reveals that appellant had a hearing and even considered that it had a hearing (R. 94–97). In March 1938, the Commission directed a rule to show cause to issue against Crescent Mountain Service (the predecessor partnership) and a number of other carriers calling attention to the fact that they had failed to furnish information or evidence necessary to dispose of their applications, and ordering them within 30 days, at the risk of dismissal, to do so (R. 89–91). Crescent Mountain Service's attorney, Mr. Milton Cotton, on March 19, 1938, filed with the Commission an affidavit, appearing in the record in this case, disclosing his appearance before the local officers of the Commission where he submitted facts in support of the application (R. 94). And on March 18, 1938, Mr. Cotton had written a letter to the Commission stating that he and his client had theretofore submitted evidence in support of the "grandfather" application, which the Examiner thought was "proper and sufficient" (R. 92–93). Under date of May 4, 1938, he wrote another letter saying he had, pursuant to instructions, "contacted the New York District office, and thereafter a hearing was had and evidence submitted relative to the preservation of applicant's rights under the 'grand-

father' clause" (R. 97). Also, the District Supervisor advised appellant on October 31, 1938, that because of protests against the June 20, 1938, order, an informal "rehearing" with respect to appellant's rights would be held on December 1, 1938 (see R. 121, 31). No new facts were developed at this rehearing (R. 122, 31), and the final disposition of the questions involved was not made until after the *Nudelman* case was decided. As the district court said: "Finally, we can see nothing improper in the procedure adopted by the Commission in changing its decision; it acted upon the same record and after notice to the plaintiff of a new hearing" (R. 35–36). Furthermore, following the order of September 2, 1941, appellant protested and submitted a written petition and argument (R. 117–120) to Division 5, which were rejected (R. 131–132). Then it appealed by petition and written brief (R. 132–136) to the entire Commission, which denied this petition for rehearing (R. 158). It is therefore obvious that appellant was accorded a hearing.

Appellant's assertion (Br. 39–41) that the Commission could not alter the June 20, 1938, order without another hearing is without merit. As appellant was proceeding under the "grandfather" clause, the Commission, before issuing a certificate thereunder, was obliged to ascertain in such manner as was reasonable and lawful the.

extent of the service rendered, and appellant, having had two opportunities at informal conferences of submitting data to support its application, was plainly deprived of no rights. As successor to the partnership, appellant, by the order of September 2, 1941, was awarded a certificate properly descriptive of its operations on June 1, 1935. Its view really is that the June 20, 1938, order accords with due process because it gave appellant what it sought, whereas the September 2, 1941, order contains procedural defects because a different authority was thereby granted. However, the Commission, like a court, on reconsideration of the original record, was perfectly free to change its mind. Cf. *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 482; *New England Divisions Case,* 261 U. S. 184, 187; *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 663; *Davidson Transfer & Storage Co.* v. *United States,* 42 F. Supp. 215, 218 (E. D. Pa.), affirmed, *per curiam,* 317 U. S. 587. Furthermore, Section 221 (b) of the Act (49 U. S. C. 321 (b)) provides that all orders of the Commission "shall continue in force until its further order, or for a specified period of time, * * * unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

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NOVEMBER 1943.

APPENDIX

Section 202 (a) (the declaration of policy) of the Motor Carrier Act, 1935, c. 498, 49 Stat. 543, provides:

> It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

The Interstate Commerce Act, Part II, c. 498, 49 Stat. 543, as amended, provides:

Section 203 (a) (13):

> The term "motor vehicle" means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical

power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Commission, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service. (49 U. S. C. 303 (a) (13).)

Section 204 (a):

It shall be the duty of the Commission—

* * * * * *

(6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and (49 U. S. C. 304 (a)).

Section 206:

(a) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in

bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect [October 1, 1935], and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which, is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission. (49 U. S. C. 306.)

Section 207 (a):

Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a

regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations. (49 U. S. C. 307 (a).)

Section 208 (a):

Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require. (49 U. S. C. 308 (a).)

Section 221 (b):

Except as otherwise provided in this part, all orders of the Commission shall

take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction. (49 U. S. C. 321 (b).)

The second report of the Interstate Commerce Commission in *Irving Nudelman Common Carrier Application, et al.*, 28 M. C. C. 91, 93–95, provides in part:

> Upon further consideration we are of the opinion that our prior construction of section 208 (a) was in error. Simply stated, under this section we are directed to specify in any certificate issued under section 206 or 207 of the act, among other things, "the service to be rendered," subject to the proviso that we cannot restrict the right of a carrier "to add to his or its equipment and facilities * * * as the development of the business and the demands of the public shall require." In other words, we clearly have the power and duty to specify in any certificate the service to be rendered, except that we may not attach maximum limitations to the quantity of the service to be furnished. This construction is in line with our decision in *Pittsburgh-Weirton Bus Co., Inc., Com. Car. Application*, 10 M. C. C. 266, wherein we discussed the meaning of the proviso in question. In that case, the issue was presented as to whether that applicant had inaugurated a new operation by increasing its service between 2 points from 1 round trip daily to 250 one-way

trips daily. In deciding that question in the negative, we construed the proviso of section 208 (a) to mean (page 270):

"This prohibition protects the right of the carrier to expand not only its 'equipment' but also its 'facilities.' The only purpose of such expansion is to enable the carrier *to provide more service,* and this is very clearly indicated by the words 'as the development of the business and the demands of the public shall require.' It follows that 'terms, conditions, or limitations' in the certificate restricting *the service* of the carrier would be wholly inconsistent with this proviso." [Emphasis supplied.]

We did not conclude in that case, however, that we were without power to restrict a carrier to the use of certain types of vehicles for the purpose of describing the service to be rendered. What we found was that we have no power to restrict a carrier by the terms of its certificate from expanding the quantity of its service to meet the demands of the public.

With this exception, our power to specify in any certificate we issue the service to be rendered is complete. For instance, in *Schwerling Common Carrier Application,* 23 M. C. C. 459, we required the applicant carrier to maintain a schedule of not less than one round trip per hour during certain periods. In other instances we have found it necessary, in order to specify definitely the character of the service to be rendered, to restrict a carrier to the use of certain types of equipment. For example: In *Miller Extension of Operations,* 21 M. C. C. 401 (prior report, 12 M. C. C. 457), the authority granted therein was restricted to liquid petroleum products in

tank trucks; in *Myers Common Carrier Application*, 23 M. C. C. 451, authority was restricted to drive-away service; in *Central Truckaway System, Inc., Com. Car. Application*, 19 M. C. C. 713, authority was restricted to truck-away service; in *Parcel Delivery Service, Inc., Contract Carrier Application*, 8 M. C. C. 275, authority was granted to transport packages and parcels of merchandise by motor vehicle "the equipment being limited to motorcycle traffic cars, with panel bodies"; in *Billy Baker Co. Common Carrier Application*, 24 M. C. C. 805, authority was granted to transport, among other things, cement in dump trucks; and in *Barrows Common Carrier Application*, 19 M. C. C. 179, authority was restricted to the transportation of not more than six passengers per trip. Thus, in numerous cases we have specified, or in effect specified, certain types of vehicles in describing the particular service to be rendered under the authority granted.

Because we have the power to restrict a carrier to the use of certain types of vehicles, in specifying the service to be rendered, it does not necessarily follow that we should in all cases impose such a restriction, for the circumstances do not always warrant it. Each case, of course, must be decided on its own merits.

Excerpts from affidavits filed with the Commission by appellant's predecessor, Crescent Mountain Service, in support of its "grandfather" application:

1. Reuben Freed, restaurant owner, of South Field, N. Y.

> The reason for their ——— service is that they transport people to hotels located in

all roads and by-roads, obviating the necessity of their passengers having to use foot or other extraordinary means to get to their actual destination (R. 64).

2. Harry K. Cohen, hotel owner, of Woodbourne, N. Y.:

> I have known Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman doing business as Crescent Mountain Service since May, 1932. Their business has been the transportation of guests of mine from New York City to my hotel and from my hotel to New York City (R. 67).

3. Moe Bail, hotel owner, of Woodbourne, N. Y.:

> We have engaged their cars on numerous occasions for the transportation of guests in our hotel to New York City and from New York City to our hotel * * *. I have also been transported by them from my hotel to New York City * * *. During my passage I noticed that they have picked up passengers from various other summer resorts located throughout Sullivan County and transported them to New York City * * * (R. 67, 68).

4. Issi Feldman, hotel owner, of Woodridge, N. Y.:

> They operate seven 7 passenger Sedans and carry passengers to and from summer hotels located in Sullivan and Ulster Counties. * * * The aforesaid Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman have been engaged in this type of transportation to and from my hotel since 1932 * * *. I sincerely believe that their mode of transportation is

extremely necessary and convenient both for my own and my guests' needs (R. 68–69).

5. Israel Levine, lessor of applicant's New York City office:

> I have personally seen them arranging for said trips with passengers * * * (R. 69).

6. Adela Dingenthal, of the Bronx, New York City:

> In the summer of 1933 and in the summer of 1934 I hired the aforesaid persons [the applicants] to transport me and my family from their office * * * to Accord in the County of Ulster * * *.
>
> * * * My family and I have personally found that this method of transportation is most convenient and the most economical for our purpose * * * (R. 71, 72, 73).

7. Edna Livingston, of the Bronx, New York City:

> Riding with us at the times that we were transported to North Branch, New York by the aforementioned Crescent Mountain Service were other passengers who were transported to various other points in Sullivan and Ulster Counties. I specifically remember other passengers being taken to Kenoza Lake, Jeffersonville, White Lake, Mongaup Valley and Swan Lake (R. 73, 74).

8. Harris Trevax, the father of one of the applicant partners:

> My wife and I helped him out by answering phone calls and booking work (R. 75).

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